TRENDS IN CRIMINAL ENFORCEMENT IN THE MARINE INDUSTRY: MORE TARGETS AND EXPANDING THEORIES OF LIABILITY

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ABSTRACT: *Owners and operators of vessels, shoreside personnel, facility managers, and corporate officers, among others, have become prime targets of environmental crimes prosecutors. With respect to the marine business, the trend began in the mid-1990s with tankers, continued with cruise ships and cargo ships, and now includes fishing vessels and tugs/barges. Shoreside facilities and pipelines are in the crosshairs as well, with increased environmental enforcement actions being filed. Prosecutors rely on theories of liability beyond those contained in environmental statutes, such as false statements and obstruction of justice, and now include regulatory violations as a basis for criminal prosecution; e.g., deficiencies in reporting and record keeping requirements. Despite numerous criminal prosecutions over the last ten years for bypassing oil-water separators on vessels or otherwise discharging oily bilge water into the ocean, such prosecutions continue at an alarming rate. Far too few companies seem to be learning from the mistakes of others. With federal and state authorities aggressively targeting environmental crimes, companies must take a hard look at their corporate compliance policies to minimize chances of being targeted for criminal prosecution. This paper will identify trends in criminal enforcement in the marine and marine-related industries and make recommendations on how companies can protect themselves and at the same time be prepared for criminal investigations.*

Background

Until the 1989 *Exxon Valdez* casualty, oil pollution incidents rarely gave rise to criminal liability. Now, however, federal and state agencies engage extensive resources in criminal enforcement of environmental laws, with the marine industry as a primary target. More than a hundred state and federal environmental crimes task forces are at work nationwide. Participants include the Department of Justice ("DOJ"), the Environmental Protection Agency ("EPA"), the U.S. Coast Guard ("USCG"), the U.S. Department of Transportation ("DOT"), and the Federal Bureau of Investigation ("FBI"), as well as numerous state and local agencies. EPA alone has more than 200 criminal investigators. The DOJ Environmental Crimes Section has grown to more than 30 attorneys who, along with colleagues in the 94 U.S. Attorneys' offices around the country, react aggressively to environmental incidents.[i] The USCG has formed a Quality Action Team to give increased emphasis to environmental crimes. According to USCG policy guidance contained in the Commandant Instruction on Criminal Enforcement of Environmental Laws dated July 30, 1997, the USCG refers cases to DOJ when investigations reveal significant environmental harm and culpable conduct (*e.g.*, repeat violations, knowledge of illegality, deliberate misconduct, falsifying documents, tampering with monitoring equipment, providing false statements, and obstruction of justice). Despite this guidance, DOJ is not restrained from prosecuting cases based simply on false information or other criteria, regardless of whether a case is referred to them by the USCG.

The increased emphasis on criminal prosecution is evident with DOJ's "Vessel Initiative," implemented a few years ago. Recently, DOJ has stated publicly on numerous occasions that it is committed to continuing enforcement actions against vessels. For instance, Thomas L. Sansonetti, Assistant Attorney General, Environment and Natural Resources, speaking in March 2002 of the *Freja Jutlandic* prosecution (relating to the failure to report a hazardous condition aboard the vessel) said, "This case sounds a warning to the maritime community that there will be no safe harbor for those who intentionally pollute and recklessly endanger human life." At a luncheon in November 2002, Mr. Sansonetti reaffirmed his commitment to the Vessel Initiative "until the oil-water separator cases dwindle to zero."

Enforcement statistics underscore this view. For fiscal year 2001, EPA reported recovery of $95 million in criminal fines and restitution. Individual defendants were sentenced to a combined total of 256 years in prison, which was an increase of more than 100 years over fiscal year 2000.[ii]

This trend is likely to continue. DOJ announced that it will be working with legislators to extend the statute of limitations for environmental crimes and add an "attempt" provision to existing criminal provisions of federal environmental laws. The attempt provision will change the scope of enforcement because most laws require harm to occur before the government can pursue environmental cases. Legislation is also pending that would increase criminal penalties under the Clean Water Act for negligent and knowing violations and the Refuse Act of 1899 for negligent violations.

The lay of the land – or sea – and recent trends.

Most recent environmental cases involving the marine industry have been brought under the Oil Pollution Act of 1990 ("OPA 90"), the Clean Water Act ("CWA"), and the Act to Prevent Pollution From Ships ("APPS"), which implements the International Convention for the Prevention of Pollution from Ships 1973/1978 ("MARPOL"). Often, however, an environmental investigation under these statutes turns into a criminal prosecution on other theories of liability, such as conspiracy, false statements, and obstruction of justice. These theories come into play when individuals involved in environmental investigations lie, mislead, minimize, or otherwise attempt to cover up wrongdoing. Discovery of such conduct can quickly convert a civil or administrative investigation into a criminal investigation.

A review of recent cases discloses that prosecutors are aggressively pursuing environmental enforcement actions against the marine industry, particularly with respect to oil-water separator violations. While prosecutors are limited in their ability to prosecute pollution violations by vessels when a pollution incident occurs in international waters because international conventions apply, they can prosecute offenders on other grounds. For example, most oil-water separator violations are prosecuted under the U.S. False Statements Act. The rationale is that a false statement is made to the USCG when an oil record book, containing deliberately incomplete or inaccurate information, is presented to the USCG in a U.S. port as required by MARPOL. The government has elected to prosecute such violations in this way because the underlying violation, a discharge of oil in violation of MARPOL in waters beyond the territorial sea, cannot be prosecuted criminally against foreign-flag vessels. Generally, a port state may only report MARPOL violations to the flag state so that the flag state can take appropriate action under MARPOL.

Another aspect of environmental prosecutions is a shift from targeting only corporations, to targeting both corporations and individuals as defendants. Now targets may be company presidents, vice presidents, operations managers, masters, chief engineers, and environment and safety managers, among others. An individual can be held criminally liable for a vessel-related violation even if the person was not aboard the vessel at the time of the alleged violation. For example, a shoreside individual can be held criminally liable for a shipboard violation if that person was in a position to know, or should have known, about an unlawful condition, consciously avoided or disregarded the condition, or misled or lied to investigators about the incident. As noted below in the *Kanah* and *Sohoh* prosecutions, a corporate board member and two shoreside employees were indicted. And, in 1998 when Holland American Cruise Lines pled to APPS violations and paid $2 million in criminal fines for discharge of oily bilge, a corporate manager pled guilty to negligently discharging oily bilge water, marking the first time a shore-based employee was prosecuted for a shipboard violation. In short, anyone who arguably had control over the conduct in question may be fair game for criminal prosecution. Even if the person or company is ultimately exonerated, the stigma and cost of a criminal investigation can be devastating.

Complementing the focus on individuals, companies can be prosecuted for environmental violations if criminal conduct can be attributed to an employee acting within the scope of his or her authority, even if the employee is not also prosecuted. One rarely sees criminal prosecution involving only the company or the individual. Generally, prosecutors go after both.

Recent cases.

In recent vessel-related criminal cases, five factors have generally led to convictions: (1) failure of a vessel owner or operator to address known deficiencies affecting the safety of the vessel; (2) failure to report a release or hazardous condition aboard the vessel; (3) false statements made to federal agents; (4) falsifications or misrepresentations in vessel logs; and (5) obstruction of justice (*e.g.*, instructing crewmembers not to talk to federal agents, lying to federal agents, or otherwise impeding an investigation).

During the first eleven months of 2002, at least nine vessel cases led to criminal charges or guilty pleas for oil-water separator violations, with prosecutions reaching all corners of the United States. Prosecutions involved the following vessels and companies:

1. *M/V Rubin Stella.* In July 2002 in Washington, the chief engineer aboard the Panamanian-flag bulker *Rubin Stella* pled guilty to making false statements in the oil record book and was sentenced to one year in prison.
2. *Norwegian Cruise Lines ("NCL").* In July 2002 in Florida, NCL pled guilty and paid a $1.5 million fine/community service payment for falsifying oil discharge records on at least two ships after the new owners conducted an audit, based on an employee's previous disclosure of violations to EPA, and disclosed additional findings to the government. The plea agreement requires NCL to cooperate with the government in its ongoing investigation of individuals.
3. *Cygnus (Fujitran Corporation).* In July 2002 in Oregon, the chief engineer of the car carrier *Cygnus* pled guilty and was sentenced to three months in prison for making false statements in the ship's oil record book by logging that waste oil was burned in the ship's incinerator when it was actually discharged overboard. The first engineer, involuntarily detained for six months while the case was pending, pled guilty to making false statements.
4. *M/V Khana* and *M/V Sohoh (Oswego Ltd.).* In May/June 2002 in Alaska, the chief engineers of the freighters *Khana* and *Sohoh*, and the captain on the *Khana*, pled guilty to keeping a false oil record book and obstruction of justice, by encouraging crewmembers to lie about a bypass hose – all three will go to prison for 6 to 8 months. The vessel operators and managers pled guilty to 10 counts of conspiring to cover up illegal discharges at sea and paid $5 million in fines. A corporate board member and two senior shoreside managers were indicted for participation in the conspiracy.
5. *M/V Guadalupe (OMI Corporation).* In May 2002 in New Jersey, the captain and chief engineer of the tanker *Guadalupe* pled guilty to falsifying the oil record book and conspiracy to cover it up.
6. *Alkyon (Ionia Management).* In May 2002 in New York, Ionia Management and the tanker *Alkyon*'s chief engineer pled guilty to making false entries in its oil record book after USCG inspectors observed piping that appeared to have been manipulated to bypass the vessel's oil-water separator.
7. *Starr Evviva (Star Shipping).* In May in South Carolina, the captain and chief engineer of the tanker *Starr Evviva* were indicted for conspiracy, witness tampering, and false statements in connection with the discharge of 24,000 gallons of fuel oil; both are now considered federal fugitives.

8. *Carnival Corporation.* In April 2002 in Florida, Carnival pled guilty to filing false statements with the USCG related to the discharge of oil and paid $18 million in criminal fines/community service for overriding sensors on oil-water separators, thus causing oil-contaminated waste to be discharged.
9. *M/V Asahi (Fairport Shipping).* In April in Alaska, the chief engineer of the Panamanian-flag freighter *Asahi* pled guilty to false statements and obstruction of justice and was sentenced to four months in prison.

The pattern of prosecutions stems from the mid-1990s when an investigation involving the U.S.-flag integrated tug-barge *Frances Hammer* revealed false statements relating to discharging oily bilge water in international waters. The criminal fine was $250,000. The ante has been raised significantly since, with most fines now in the millions. Settlements typically include other components, such as environmental compliance programs, environmental officers for each ship, detention of individuals in the United States, prohibition of ship's officers from calling in the United States, reports to the USCG in advance of every arrival, and imprisonment. These requirements can impose costs on the owner/operator that far exceed the amount of a fine.

The focus of maritime-related prosecutions is not limited to vessels. Recent noteworthy land-based cases include the following:

1. *Olympic/Shell Pipeline.* In September 2001, Olympic Pipeline Company, Shell Pipeline Company, and corporate officers were indicted in connection with a pipeline explosion that resulted in three fatalities. Many of the charges were based on regulatory violations, including the failure to properly train employees, failure to adequately maintain the pipeline, and the failure to adhere to various operating procedures. In December 2002, Olympic's former manager and supervisor both pled guilty to knowingly and willfully violating the Hazardous Liquid Pipeline ("HLP") regulation that sets forth safety and training requirements. Both men face a maximum penalty of five years in prison and a $250,000 fine. Olympic's control operator pled guilty to negligently causing the discharge of a harmful quantity of gasoline into U.S. waters in violation of the CWA. He faces a maximum penalty of one year in prison and a $100,000 fine. Olympic pled guilty to (1) knowingly and willfully violating an HLP regulation that sets forth safety training standards; (2) negligently causing the discharge of a harmful quantity of gasoline into U.S. waters; and (3) unlawfully discharging refuse matter into U.S. waters without a permit. Shell Pipeline pled no contest to the knowing and willful violation of the safety training regulation, and negligently discharging a harmful quantity of gasoline in U.S. waters. In their plea agreements, Olympic and Shell agreed to pay civil and criminal fines totaling $36 million, to comply with the terms and conditions of a consent decree, and to be placed on probation for five years. The $36 million fine represents the largest criminal and civil fine ever assessed for a pipeline release. The companies also settled two wrongful death claims for $75 million and one for an undetermined amount.
2. Hoy's Marine. In January 2002, the former owner of a Newport, Oregon ship repair facility pled guilty to discharging pollutants into the Yaquina River in violation of the CWA. The company repaired ships by pressure washing and sand blasting the hulls, and despite two fines and repeated warnings from the state, Hoy allowed the sandblasting residue and paint from his operation to be discharged into the river. In June 2002, the owner was ordered to pay $70,000 in restitution, a $27,000 state fine, and spend four months in prison.
3. Western Towing. In November 2001, the supervisor of the barge cleaning facility in Houston was charged with conspiracy to violate the CWA, discharging waste water into the San Jacinto River, manipulating lab samples, and making false reports to a state agency. A foreman and the company pled guilty to permit violations in March and May 2002, respectively. The foreman, who cooperated with the investigation, was sentenced to one-year probation. Western Towing was ordered to pay $30,000 in criminal fines. The supervisor was acquitted in April 2002 after a jury trial.
4. *Venitian Harbor*. In January 2002, Venetian Harbor, Inc., its president/treasurer, and an employee were sentenced on charges of conspiracy to violate the CWA and illegal dumping in violation of the CWA. Venetian Harbor operated a restaurant from a converted towing vessel moored on the Mississippi River from 1995-1999. In order to avoid the costs of proper disposal, the defendants discharged sewage from the vessel into the river and adjoining ditches. Venetian Harbor was ordered to pay a $90,000 fine; its president was sentenced to 90 days in prison, a $90,000 fine, and 100 hours of community service; and the employee was sentenced to 30 days in prison, a $10,000 fine, and one year of home confinement.

Not surprisingly, a business competitor or disgruntled employee sometimes provides information leading to a criminal investigation of a particular entity. This is illustrated by two marine cases in which crewmembers "blew the whistle" by informing the USCG of conduct aboard a vessel that they considered illegal or unsafe. In one case involving the cruise ship *Rotterdam*, the illegal discharge was reported to the USCG by an assistant engineer, who was awarded $500,000 for his role in providing information to the authorities. This award was consistent with statutory provisions contained in APPS that allow for awards of up to one-half the total penalties to any person who provides information leading to a conviction. In another case, a now-bankrupt shipping company pled guilty to charges of presenting false logbooks to the USCG and conspiracy to conceal an oil leak in the hull of its Norwegian-flag oil tanker, the *Freja Jutlandic*, and paid a $250,000 fine. Two crewmembers reported the leak to the USCG in spite of company instructions, and were awarded half of the criminal fine. As a result of the whistleblower provision in APPS, crewmembers have an incentive to report wrongdoing – making it all the more important that vessel owners/operators get their environmental houses in order.

One recent example demonstrates that quick action by a company to report violations can mitigate fines and penalties. As a general matter, the U.S. Sentencing Guidelines for Organizations ("USSG") require that a corporation's cooperation and whether the offense was self-reported be considered in sentencing decisions. In addition, the USSG provide for a lower sentence for companies that have in place "an effective program to prevent and detect violations of law." In part, such a program must include "reasonable steps to achieve compliance with its standards, *e.g.,* by utilizing monitoring and auditing systems reasonably designed to detect criminal conduct . . . " In the NCL case discussed above, DOJ agreed to a relatively light penalty ($1.5 million) as a result of the company's self-reporting of the violations to the government and cooperation with the

investigation. Credit was given for the self-reporting, even though the EPA had previously been informed of the violations by a former NCL employee. This can be contrasted to other cases involving similar violations whereby much higher criminal penalties were applied, *e.g.*, Royal Caribbean Cruise Lines paid $27 million and Carnival Corporation paid $18 million. In fact, DOJ stated in a press release that "NCL deserves considerable credit for its early disclosure of violations, before the government's investigation became manifest and without any promise of leniency . . . [but] the sad fact remains that the practice of dumping waste oil and maintaining false log books has proved to be commonplace in the maritime and cruise ship industry."

Recommendations.

Owners and operators can do many things to avoid criminal prosecutions. The first goal is to get one's own environmental house in order. This is illustrated by the fact that prosecutors generally consider the following factors when deciding whether to pursue a criminal investigation: (1) the seriousness of actual or potential harm to the environment; (2) the defendant's prior history of violations or of compliance; (3) the defendant's willingness to cooperate at the outset; (4) evidence that the defendant had knowledge of or the ability to prevent the incident; (5) motive or economic gain; and (6) whether the company has an effective environmental compliance program in place.

It is more important than ever for companies to establish and implement an environmental compliance program. To the extent that a company can demonstrate that it has made compliance a priority, it may be able to avoid exposure to criminal penalties (or at least to minimize them) in the event of a pollution incident.

Here is what you should do to minimize your liability exposure:

- Conduct regular legal and technical audits of operations for environmental compliance
- under supervision of counsel. Develop checklists to make monitoring compliance easier.
- Correct deficiencies promptly and keep good records.
- Get your environmental house in order because disgruntled employees and competitors may tip off investigators.
- Establish an environmental compliance program consistent with environmental crimes and organizational sentencing guidelines.
- Anticipate a crisis or enforcement action and plan accordingly. It is better to have a plan without a crisis than a crisis without a plan.
- Train employees regarding the environmental compliance program and put someone in charge of environmental compliance. It is imperative that employees have an ownership interest in environmental compliance.
- Train employees on how to deal with investigators, including with respect to employees' rights and responsibilities.
- Establish a company practice that encourages employees to contact counsel before agreeing to interviews. Employees must be informed, however, that they can speak to investigators if they wish.
- If employees speak with or without counsel, they must know that telling the truth is critical. Lying to a federal official in the course of an investigation is a crime in itself.
- If a discharge occurs, immediately report it and begin a response. Employees must be cautious about giving statements to the USCG or other investigators regarding the cause of the spill because whatever is said can lead to a criminal investigation.
- Cooperate, through legal counsel, with investigators. The rule: Do not hide information, mislead, or lie to investigators. Again, these actions can be crimes in and of themselves.
- Establish contact now with reputable criminal defense counsel with whom the company is comfortable.

Most importantly, be aware, bad things can happen to good companies. Act now to save you and your company's money from the perils of a criminal prosecution.

Biography

Jeanne M. Grasso, a partner with the law firm of Blank Rome LLC (formerly Dyer Ellis & Joseph), specializes in maritime and environmental law. Her practice involves issues confronting vessels, facilities, and cargo owners on an international, federal, and state level. Ms. Grasso has extensive experience in conducting internal investigations and defending companies in civil and criminal environmental enforcement actions. Ms. Grasso received her B.S. in Biology from the University of Notre Dame, a Masters in Marine Affairs from the University of Southern California, and a J.D. with honors from the University of Maryland.

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[i] The numbers of task forces, prosecutors, and investigators cited herein are estimates only and are the result of informal discussions with enforcement officials.

[ii] EPA Press Release (January 31, 2002); *EPA Achieves Significant Compliance and Enforcement Progress in 2001*.